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IN THE

# Supreme Court of the United States

October Term, 1969
No. 1020

GERSHON L. LEWIS,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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GERSHON L. LEWIS,

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*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

The Petitioner, Gershon L. Lewis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on October 31, 1969, as modified on December 2, 1969.

## Opinions Below.

The opinion of the Court of Appeals as modified is not yet officially reported. The opinion of October 31, 1969, and modification of December 2, 1969, are appended as appendices A and B respectively.

The order of the Court of Appeals of September 10, 1968 is appended as appendix C. The order of the United States District Court for the Central District of California is appended as appendix D.

## Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 31, 1969. A timely petition for a rehearing *in banc* was denied on December 2, 1969. The original opinion was also modified on December 2, 1969. This petition for certiorari will be filed on or before January 2, 1970. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1) and 28 U.S.C. 1651 (All Writs Act).

## Questions Presented.

1. Was it an abuse of the historic independence of the grand jury and the secrecy of its proceedings for criminal investigators of the Internal Revenue Service to be sworn in as "agents of the grand jury" so they could issue and utilize grand jury subpoenas for the purpose of obtaining, analyzing and considering evidence of alleged criminal violations pertaining to the making of political contributions?

2. Did the Court of Appeals err in refusing to consider the important question raised concerning the abuse of the grand jury in determining that the District Court's action in refusing to quash grand jury subpoenas was interlocutory and not appealable and also that relief under the All Writs Act was not appropriate?

## Constitutional and Statutory Provisions Involved.

### United States Constitution, Amendment IV.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath

or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**United States Constitution, Amendment V.**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**United States Code, Title 28.**

SEC. 1861. It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries, selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

**United States Code, Title 28.**

SEC. 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule *nisi* may be issued by a justice or judge of a court which has jurisdiction.

**United States Code, Title 26.**

SEC. 7602. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

**Federal Rules of Criminal Procedure.**

* * *

6(d) *Who may be present.* Attorneys for the government, the witness under examination, interpreters when needed, and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grant jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

6(e) *Secrecy of proceedings and disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

## Statement of the Case.

These proceedings arise out of an investigation of political contributions which was commenced by the Internal Revenue Service. As a part of this investigation, an Internal Revenue Service administrative summons was issued to petitioner pursuant to Section 7602 of the Internal Revenue Code, (26 U.S.C. 7602). Petitioner's counsel appeared at the required time and place and asserted, on behalf of petitioner, various legal and constitutional objections to the summons. Included in these objections were the contentions that civil administrative process was being used in an attempt to obtain evidence for use in a criminal proceeding; that the method by which the investigation was being carried out was violative of various other Constitutional rights of the petitioner and that safeguards did not exist to insure that the investigation of this particular petitioner was not based purely upon political considerations.

Thereafter, a special grand jury was convened in Los Angeles for the sole purpose of investigating political contributions. At the time of the first meeting of this special grand jury, approximately 25 Special Agents of the Intelligence Division of the Internal Revenue Service, the criminal investigators of the Internal Revenue Service, were sworn in as "agents of the grand jury". All of these Special Agents had been involved in the same Internal Revenue Service investigation previously. Accordingly, they were all well acquainted with various aspects of the investigation, including the identity of various suspects and payments.

On August 9, 1968, a grand jury *subpoena duces tecum* was served upon petitioner by one of the "agents of the grand jury." The *subpoena* called for the produc-

tion on August 20, 1968, of substantially the identical material as required by the Internal Revenue Service summons previously served upon the petitioner. Through the utilization of a grand jury *subpoena duces tecum*, the government planned to have the same Internal Revenue Service agents examine the same material as that originally required by the Internal Revenue Service administrative summons.

Prior to the return date of the grand jury *subpoena duces tecum*, petitioner filed a motion to quash said subpoena. This motion was denied by the United States District Court. Thereupon, petitioner filed an application for writ of prohibition or writ of mandamus or, in the alternative, application for stay pending appeal with the United States Court of Appeals for the Ninth Circuit. After informal argument, the Court of Appeals, on September 10, 1968, issued an order which stated in pertinent part:

> "The petition in No. 23173 was presented to Judge Barnes and at about the same time, the petitions in Nos. 23177 [the instant proceedings] and 23178 were presented to Judge Ely. Judges Barnes and Ely conferred and determined that the two of them would act in cooperation in the determination of the three petitions, at least preliminarily. They invited informal oral argument on the part of the petitioners, of the respondent, and of the United States, and such oral presentation was made. The attorneys for the government agreed that the times for the appearance by petitioners in response to the subpoenas would be continued, pending the disposition of the petitions by the Judges of this court.

"Upon consideration, Judges Barnes and Ely have determined that each of the three petitions presents issues which should, according to the internal policy and practices of the court, properly be decided by a panel of three judges of the Court of Appeals and, in line with such policy, Judges Barnes and Ely will summon a third judge to assist in the disposition of the three petitions. When the third judge has been designated, he, along with Judges Barnes and Ely, will decide if additional oral argument will be heard. Meanwhile, each of the parties will, within seven days from the date of this order, advise the court as to whether or not there is a desire to present oral argument before the three judges.

"In aid of the jurisdiction of the Court of Appeals, it is directed that compliance with the subpoenas questioned shall be stayed, until further order of this court.

"Pending the final disposition of the three petitions, the District Court is authorized to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions. If the petitioners renew their motions to the District Court, and if the District Court decides to conduct any hearing, then the petitioners will immediately notify the Clerk of the Court of Appeals to the end that the judges concerned will be apprised of the possibility of a supplementation of the record.

/s/ Stanley N. Barnes
/s/ Walter Ely
United States Circuit Judges."

In accordance with this order petitioner filed a motion with the United States District Court to supplement the record. The District Court limited petitioner to the filing of affidavits and denied petitioner any discovery. The District Court thereafter refused to quash the subpoenas and after the matter, was briefed and argued, a different panel of the Court of Appeals rendered the decision from which this writ of certiorari is sought.

Throughout these proceedings, petitioner has contended that the grand jury's historic independence was being perverted and abused by the government's attempt to empower its criminal investigators with the authority to act in the place and stead of the grand jury. Petitioner further contends that the obvious purpose of this abuse of the grand jury's function and violation of the secrecy of its sessions was to avoid the proscriptions against unlawful searches and seizures contained in the Fourth Amendment.

Because of the extreme importance of this question and its impact upon the proper administration of justice, petitioner submits that the Court of Appeals should have considered the substantive issues presented whether in the form of an appeal or as an application for an appropriate writ.

## REASONS FOR GRANTING THE WRIT.

### The Integrity of the Grand Jury System and With It, the Administration of Criminal Justice Are in Jeopardy if the Government Is Permitted to Substitute, in Effect, Its Criminal Investigators for an Impartial, Independent and Fair Cross-Section of the Community Selected at Random.

During the course of these proceedings, it was established that the same Special Agents of the Internal Revenue Service who had been taking part in the Internal Revenue Service's nation-wide investigation of political contributions were sworn in as "agents of the grand jury". The government explained that it was contemplated that all books and records produced in response to grand jury *subpoenas duces tecum* would be turned over to these "agents of the grand jury" for their analysis and review. Thereafter, these "agents of the grand jury" would report their observations and conclusions to the grand jury as well as make recommendations to the grand jury. Thereafter, the government concluded the grand jury would consider the conclusions of its "agents" and act upon such conclusions, recommendations and observations. The secrecy of the grand jury would not be violated, the government argues, since the agents were sworn to secrecy and thus would not reveal any information obtained even to the Internal Revenue Service. Furthermore, since the "agents" would not be present when the grand jury deliberated, the grand jury's independence would be assured, the government's argument concludes.

Petitioner submits that the government's position is a dangerous one. It is particularly dangerous since it represents the considered position of the two most

significant government law enforcement agencies, the Department of Justice and the Treasury Department. This concerted effort represents such a significant departure from the accepted and usual course of judicial proceedings that the exercise of this Court's power of supervision becomes mandatory.

There is absolutely no authority for the procedure which the government has utilized in the present investigation. Nowhere in the United States Code of Judicial Procedure can one find authorization, or for that matter a description of "agents of the grand jury". Quite to the contrary, Rule 6 of the Federal Rules of Criminal Procedure explicitly provides that no one other than the attorney for the government, the witness, interpreters when needed, and stenographers or recording-device operators may be present when the grand jury is in session.

There is certainly no significant difference between the "agents of the grand jury" examining books and records produced in response to a grand jury *subpoena duces tecum* and their examining witnesses produced in response to a grand jury subpoena. Either of such procedures is a patent violation of the long-standing rule of privacy and secrecy of grand jury proceedings and constitutes an usurpation of the grand jury's duty.

Perhaps the oldest and most often cited case in this area is *United States v. Edgerton*, 80 Fed. 374 (D.C. Mont. 1897). In that case an individual who had been called as an expert witness was permitted to remain in the grand jury room while other witnesses were examined. In quashing the indictment returned by the grand jury the court stated:

"It is beyond question that no person, other than a witness undergoing examination, and the attorney for the government, can be present during the sessions of the grand jury. The rule is inherent in the grand jury system with all the force of a statutory enactment. The cases where bailiffs and stenographers have on occasions been temporarily present in the grand jury room are only apparent exceptions. The rule, in its spirit and purpose, admits of no exception. In the present case it is suggested that the only testimony heard while the expert Flynn was present related to the production of certain books of account, touching which the expert interrogated the witness who was testifying as to his possession of such books or other documents, and that this could not have prejudiced the defendant. The court cannot know that this suggestion represents the fact. The case as presented is one where an expert was not only present in the grand jury room while a witness was testifying, but took part in the investigation by interrogating the witness. The court cannot inquire as to the effect of this conduct. There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in *Lewis v. Commissioners,* 74 N.C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury? It is common knowledge that expert witnesses are more likely to testify from interest than any other class. They usually testify

> to support or overthrow a theory, and frequently, if not usually, after an ex parte investigation, which strongly predisposes them in favor of the party or cause in whose services they are enlisted."

*Edgerton* has been cited and followed by at least the following cases: *United States v. Borys,* 169 F. Supp. 366, 367 (D.C. Alaska 1959); *United States v. Rosenthal,* 121 Fed. 862, 871 (C.C. N.Y. 1903); *United States v. Carper,* 116 F. Supp. 817, 821 (D.C. D.C. 1953); *Latham v. United States,* 226 Fed. 420, 442 (5th Cir. 1915); *United States v. Heinze,* 177 Fed. 770, 774 (C.C. N.Y. 1910); *United States v. Rubin,* 218 Fed. 245, 250 (D.C. Conn. 1914).

In *Heinze,* the facts are almost identical to those in the instant proceedings. In that case the United States Attorney in presenting evidence to the grand jury utilized the services of an expert accountant. This accountant was appointed by the Attorney General as a "Special Assistant to the United States Attorney" and was ". . . authorized and directed to conduct grand jury proceedings." In performing these duties, the accountant assisted by suggesting to the prosecutor in the presence of the grand jury the method by which other expert accountants should be questioned.

In quashing the indictment returned by the grand jury, the court pointed out that the presence of the accountant during the grand jury proceedings was plainly not authorized since he was neither an officer of the Department of Justice nor an attorney. The court then stated:

> "The necessary result of the government's position is that it is now within the power of the

Attorney General to appoint a class of 'special assistants to district attorneys' (not special assistant district attorneys), who may be accountants, doctors, chemists, engineers, etc., and, having severally authorized them to conduct grand jury proceedings, may put them in charge of such cases as would be benefited by special technical education. This may be a good system, but it has not been adopted by law, and the fact that Mr. Fernsler did not conduct in their entirety the proceedings in this case does not change the fact that, if his appointment be construed as the government does construe it, he might have done so.

". . . The commonwealth may call expert witnesses, but it has never before been urged that counsel is entitled to have at his elbow in a grand jury room an expert assistant. He is not entitled to it before a petit jury, though the practice is common by permission of the court; but no court has, or ought to have, the same dispensing power in grand jury proceedings that it possesses and daily exercises in the conduct of civil cases at common law."

While it is true that recently Rule 6(d) of the Federal Rules of Criminal Procedure has been modified to permit the presence of a stenographer or operator of a recording device, the Rule continues explicitly to exclude persons other than government attorneys, witnesses and interpreters from being present while the grand jury is in session. There is no statute, rule or case which authorizes experts such as Special Agents of the Internal Revenue Service to be sworn in as "agents of the grand jury."

The obvious danger of the contemplated utilization of Internal Revenue Service Special Agents as "agents of the grand jury" becomes apparent when it is observed that these "agents of the grand jury" continue to be paid by the Internal Revenue Service, continue to occupy their same offices in the Internal Revenue Service building, continue to be supervised by the same superiors in the Internal Revenue Service, continue to perform regular Internal Revenue Service duties while acting as "agents of the grand jury", and continue to have access to information obtained from Internal Revenue Service sources and associates while serving as "agents of the grand jury". Furthermore, under this procedure, only the information which the Internal Revenue Service agents and the representatives of the United States Attorney want the grand jury to know about would be submitted to the grand jury. Only the "agents of the grand jury" would know the source of the information submitted to the grand jury. The honorable or otherwise good intentions of criminal investigators has never been accepted as a basis for obviating the requirements of stringent control over said investigators.

Perhaps even more significantly, the purpose for the utilization of this special grand jury and its subpoena powers must be examined. This Court can take judicial notice of the fact that during the period immediately preceding the convening of the special grand jury, various cases attacking the power of the Internal Revenue Service's Special Agents to issue administrative summonses for the purpose of obtaining evidence for use in criminal proceedings were pending. Because of the pendency of such actions in both the United

States District Court for the Central District of California and the United States Court of Appeals for the Ninth Circuit, the government was experiencing a considerable problem of non-compliance with Internal Revenue Service administrative summonses by taxpayers. To overcome this situation, the utilization of "agents of the grand jury" device was decided upon, and grand jury *subpoenas duces tecum* were served on the same taxpayers who had refused on legal and Constitutional grounds to comply with the previously served Internal Revenue Service administrative summonses. In fact in several cases, grand jury *subpoenas duces tecum* were served upon taxpayers against whom summons enforcement proceedings were then actually pending.

The utilization of the "agent of the grand jury" approach had the following advantages for the government:

(1) It obviated the need for establishing probable cause which would otherwise be required before a search warrant could be obtained, thereby permitting widespread investigations limited only by the whim of the investigating officer.

(2) It permitted the utilization of the same investigators who had been conducting the identical investigation for the two preceding years and allowed for a total overlap and commingling of information obtained by the use of the Internal Revenue Service's administrative summonses as well as by grand jury *subpoenas duces tecum.*

(3) It insured that the grand jury would only see and consider what the investigating agents and prosecuting attorneys decided they should see and in the

form and fashion in which they decided to present such evidence.

(4) Since the investigation dealt entirely with the sensitive area of political contributions, it insured that the grand jury could not interfere with the targets of the investigation and therefore was unable to guarantee that the investigation would be kept free from political considerations and motives.

(5) It insured that enough pressure would be exerted upon the grand jury that it would do exactly what it would be requested and expected to do.

It is submitted that the presence of any of the foregoing purposes renders the grand jury illegal and its process a nullity. The presence of all five of these factors requires the immediate and forceful intervention by this Court for *if the Grand Jury has no independence, it has no purpose.*

In *Wood v. Georgia,* 370 U.S. 375, 390 (1962), this Court traced the origin and purpose of the grand jury as follows:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will. Particularly in matters of local political corruption and investigations is it important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot effec-

> tively operate in a vacuum. It has been said that the 'ancestors of our "grand jurors" are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute.' 2 Pollock and Maitland, History of the English Law (2d Ed. 1909), 642. The necessity to society of an independent and informed grand jury becomes readily apparent in the context of the present case. For here a panel of judges, themselves elected officers and charged under state law with the responsibility of instructing a grand jury to investigate political corruption, have exercised the contempt power to hold in contempt another elected representative of the people for publishing views honestly held and contrary to those contained in the charge. And, an effort by the petitioner to prove the truth of his allegations was rejected, the court holding irrelevant the truth or falsity of the facts and opinions expressed in the publications. 103 Ga App 305, 321, 119 SE2d 261, 273. If the petitioner could be silenced in this manner, the problem to the people in the State of Georgia and indeed in all the States becomes evident."

The utilization of "agents of the grand jury" in the instant proceedings represents such a dangerous departure from the heretofore accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Not only should this attempted perversion of the grand jury's independence and secrecy be thwarted, but the improper utilization of this impotent grand jury must be quashed in this case and prohibited in future cases.

This Court has been increasingly zealous in guarding the independence and secrecy of the grand jury, and although some respected authorities have called the grand jury nothing more than a mere rubber stamp of the prosecution.[1] the time has come, in this case at least, to draw the line beyond which the government may not trifle with this adjunct of the independent American judiciary. The granting of a writ of certiorari by this Court on December 15, 1969, in the case of the *United States v. Gifford-Hill-America, Inc., et al.*, October Term, 1969, Case No. 515, demonstrates this in unequivocal fashion.

**The Court of Appeals Abdicated Its Responsibility of Supervision Over the District Court and the Integrity of the Grand Jury by Determining That the District Court Proceedings Were Not Appealable and That Relief Under the All Writs Act Was Not Appropriate.**

The action of the Court of Appeals for the Ninth Circuit in refusing to consider the merits of this case constitutes a complete reversal of the position previously taken by the Court of Appeals and amounts to an abdication of its judicial responsibilities. This inexplicable change in position by the Court of Appeals is a complete turnabout from its pronouncements made within the past five years. For example, in *Continental Oil v. United States,* 330 F. 2d 347 (9th Cir. 1964), a case wherein the Government was attempting to compel a disclosure of confidential lawyers' memoranda concerning communications between counsel and client by the use of a grand jury subpoena, the court was

[1]See 8 *Moore's Federal Practice, Cipes, Criminal Rules* ¶6.02(1).

apparently so repelled by this proposal that it denied the government's motion to dismiss the appeal, ordered an expedited hearing on the merits during which compliance with the subpoenas was ordered stayed, and then determined the merits of the substantive issue which had been raised. The court held that the subpoenaed material was covered by the attorney-client privilege, and the grand jury subpoena was ordered quashed. In reaching this conclusion the court brushed aside the question of whether it was passing on the merits either by appeal or by way of an application for appropriate writ.

The Court of Appeals did precisely the same thing in *Maricopa Tallow Works v. United States,* (9th Cir. No. 21802), in an unreported order dated August 16, 1967. (Since this order is unreported, a copy of it is appended hereto as Appendix E).

In *Moore's Federal Practice,* Vol. 6, page 93, it is stated:

> "If the order is nonappealable and the party nevertheless takes an improvident appeal, there is authority to the effect that the improvident appeal may be treated as a petition for an appropriate writ; and there is *contra authority,* which makes the label attached to a particular paper all important —a very peculiar doctrine for a modern court to espouse." (footnotes omitted.)

The cases cited by *Moore's* as authority for the affirmative position are significantly the Ninth Circuit cases of *Shapiro v. Bonanza Hotel Co.,* 185 F. 2d 777 (9th Cir. 1950); and *Steccone v. Morse-Starrett Products Co.,* 191 F. 2d 197 (9th Cir. 1951). The neg-

ative authority cited is *Zamore v. Goldblatt,* 201 F. 2d 738 (2nd Cir. 1953).

In its opinion in the instant case, the Court of Appeals initially concluded that these proceedings were interlocutory and not appealable on the basis of *Cobbledick v. United States,* 309 U.S. 329 (1940). Relief under the All Writs Act was not appropriate either, it concluded on the basis of *Will v. United States,* 389 U.S. 90 (1967).

Petitioner contends that neither of these decisions requires the result reached by the Court of Appeals. At the outset it must be noted that relief under the All Writs Act was neither sought nor discussed in *Cobbledick.* Perhaps more importantly, however, petitioner is not in these proceedings questioning the propriety of the grand jury's process as much as the unlawfulness of the constitution of the grand jury itself. This is vastly different from the situation in *Cobbledick* and for that matter from the situation in *Continental Oil, supra.*

The exercise of this Court's supervisory power and authority is appropriate in the instant case. While the doctrine against piecemeal appeals persists, this Court should not permit it to be used as a means of promoting a miscarriage of justice. Such a miscarriage of justice will occur both in this case and in others if the government is permitted to continue to abuse the grand jury's process in the manner that it has herein.

The Court of Appeals' reliance upon *Will* is misplaced, since in that case the principal thrust of this Court's opinion vacating the writ of mandamus was the total lack of explanation for the issuance of the writ by the Seventh Circuit. In its losing brief in the

*Will* case, (pp. 25-26) the government urged to this Court that mandamus was a much preferred procedure to an authorized appeal from a conviction for contempt for violation of a trial court's order. Certainly the interests of justice would not be promoted by requiring appellant to commit the crime of contempt in order to assert and protect a constitutional right. *Cobbledick* is not good law if this is what it is construed to mean today.

## Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

December 31, 1969

Respectfully submitted,

WALTER S. WEISS,
*Counsel for Appellant.*

*Of Counsel:*
LONG & LEVIT,

## APPENDIX A.

### Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman, and Thriftimart, Inc., a California corporation, Petitioners, vs. United States District Court for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents. No. 23,173.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Gershon L. Lewis, Gershon L. Lewis, Appellant, vs. United States of America, Appellee. No. 23,177.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Joseph R. Bolker, President of Walpole Estates, Inc., Joseph R. Bolker, Appellant, vs. United States of America, Appellee. No. 23,178.

October 31, 1969

Appeal from the United States District Court for the Central District of California

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH*, District Judge.

DUNIWAY, Circuit Judge:

These three cases were separately briefed but were argued together because they all present similar questions. In No. 23,173, petitioner Lampman seeks a writ directing the District Court to set aside an order deny-

*Honorable Russell E. Smith, United States District Judge, District of Montana, sitting by designation.

ing a motion to quash a subpoena, and to grant the motion to quash. Lampman has not appealed from the order denying his motion to quash. In Nos. 23,177 and 23,178, Lewis and Bolker have appealed from orders denying their motions to quash subpoenas.

In each case, the basic facts are similar. Each individual petitioner or appellant is an officer of a corporation. Each was served with a subpoena, directing him to appear before a Federal Grand Jury and to bring with him certain records of the corporation. Each corporation had previously been served with an administrative summons issued by the Internal Revenue Service (see 26 U.S.C. § 7602), and demanding the same records. Each had declined to comply. After various maneuvers, proceedings to enforce these summonses have not been pressed, and the District Court has denied motions to quash the Grand Jury subpoenas.

We conclude that the orders attacked are interlocutory, are not appealable, and are not such that we should seek to control the District Court's action under the All Writs Act (28 U.S.C. § 1651.) We therefore do not decide the questions that the parties seek to present.

1. *The orders are not appealable.*

In *Cobbledick v. United States,* 1940, 309 U.S. 323, the Court held that an order denying the motion of one subpoenaed to appear and produce documents before a Grand Jury to quash the subpoena is not a final appealable order. It affirmed a judgment of this court, dismissing such an appeal. No case cited to us indicates that *Cobbledick* is not still good law.[1]

[1] *Cobbledick* has been repeatedly cited by the Supreme Court in cases which follow the policy against piecemeal litigation on which

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Our decision in *Continental Oil Co. v. United States*, 9 Cir., 1964, 330 F.2d 347, is not to the contrary. That case also concerned the denial of a motion to quash Grand Jury subpoenas. We order the subpoenas quashed. As to our jurisdiction, we said: (p. 349)

> "We have concluded that the appellants-petitioners are entitled to relief either by way of appeal, see *Perlman v. United States*, 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950, *Schwimmer v. United States*, 8 Cir., 232 F.2d 855, or by way of mandamus or prohibition, see *La Buy v. Howes Leather Co.*, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, *Atlass v. Miner*, 7 Cir., 265 F.2d 312, *United States v. Cobb*, 9 Cir., 328 F.2d 115."

We did not decide which. And apparently *Cobbledick* was not called to our attention. We think that, in view of *Cobbledick*, we should treat *Continental Oil* as a case in which we granted relief under the All Writs Act.

2. *Relief under the All Writs Act is not appropriate here.*

Every consideration relating to piecemeal litigation and delay of Grand Jury proceedings on which the Supreme Court rested its decision in *Cobbledick* is equally applicable when we consider whether to exercise our jurisdiction under the All Writs Act. The Supreme Court so indicated in *Will v. United States*, 1967, 389

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it rests. *E.g., Will v. United States*, 1967, 389 U.S. 90, 96; *DiBella v. United States*, 1962, 369 U.S. 121, 124; *Parr v. United States*, 1956, 351 U.S. 513, 518. See also *Thornton v. Corcoran*, D.C.Cir., 1969, 407 F.2d 695, 697; *Stewart v. Bishop*, 8 Cir., 1968, 403 F.2d 674, 678.

U.S. 97-98. In *Will,* the Court cautions against use of the writ as a means of reviewing an interlocutory non-appealable order, especially in a criminal case. We are told to limit its use to exceptional cases amounting to judicial usurpation of power. And we can find no such circumstances here. Whether, in the light of *Will,* we would decide *Continental Oil* in the same way today, we need not decide.

In Nos. 23,177 and 23,178, the appeals are dismissed. In No. 23,173, the petition is denied.

## APPENDIX B.

### Order.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman and Thriftimart, Inc., a California corporation, Petitioners, vs. United States District Court for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents. No. 23,173.

In the Matter of the Grand Jury Subpoena Duces Tecum Served upon Gershon L. Lewis, Gershon L. Lewis, Appellant, vs. United States of America, Appellee. No. 23,177.

Filed, Dec. 2, 1969.

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH, District Judge.

The opinion in these cases is modified by striking the sentence appearing at lines 8 and 9, page 3 of the slip opinion reading as follows: "And apparently *Cobbledick* was not called to our attention." and substituting the following sentence: "*Cobbledick* was called to our attention in that case but was not cited or discussed in the opinion."

The petitions for a rehearing filed on November 12 and 13 are denied.

No active judge of the court has voted to hear the matter in banc. The suggestion of a hearing in banc is rejected.

## APPENDIX C.

### Order.

United States Court of Appeals, for the Ninth Circuit.

Owen B. Lampman, and Thriftimart, Inc., a California corporation, Petitioners, v. United States District Court, for the Central District of California, and Jesse W. Curtis, a Judge thereof, Respondents, United States of America, Real Party in Interest. No. 23173.

In The Matter of The Grand Jury Subpoena Duces Tecum Served Upon Gershon L. Lewis. No. 23177.

In The Matter of The Grand Jury Subpoena Duces Tecum Served Upon Joseph R. Bolker. No. 23178.

Before: BARNES and ELY, Circuit Judges.

While the background in these three matters is somewhat dissimilar, the identify of issues and requested relief justifies their combined treatment.

I. *No. 23173*

Owen B. Lampman is secretary of Thriftimart, Inc., hereinafter "Thriftimart." As such, he was served on Aug. 9, 1968, with a subpoena duces tecum, issued through the grand jury of respondent court, directing him to appear before the grand jury on Aug. 19, 1968, with extensive books and records of Thriftimart. Through counsel, petitioner learned that the subject of the grand jury's investigation was contributions to political campaigns and that the grand jury would not itself see the materials but would be informed of the contents of petitioners' records by special agents of the Internal Revenue Service acting as agents of the grand jury in their examination.

In September of 1967, the Internal Revenue Service had itself attempted to examine these documents. At that time the I.R.S. had stated its purpose as being a determination of whether or not any crime or crimes of any nature had been committed. Thriftimart's records had been audited and approved annually by the Service and those for 1962-1964 were, at the time of the summons, admittedly protected from another audit by the three year statute of limitations, unless fraud were charged, and no such claim was here made.

Thriftimart, citing both the Service's refusal to specify its purpose in the investigation and the statute of limitations, refused to produce the requested materials. In response, the Government served Thriftimart's president with an administrative summons on May 21, 1968, ordering his appearance with the previously requested records. Thriftimart again declined to produce the records and the Service took no action to enforce its summons. Petitioner's reaction to the grand jury subpoena was the filing with respondents of a motion containing three alternative orders. These were: 1) that the appearance date of the subpoena would be postponed one month to allow petitioners time to prepare a motion to quash the subpoena; or 2) that the court quash the subpoena and direct the Government to proceed through a formal motion for a subpoena duces tecum; or 3) that the subpoena be quashed.

Respondent denied the motion on Aug. 14, 1968, holding the subpoena to be adequate. Petitioners have now requested an order from this court that would: first, restrain all proceedings under the subpoena until after a hearing on a writ of mandamus to compel respondents to vacate the order and to provide petitioners

with an opportunity to file an adequate and appropriate motion to quash the subpoena; second, vacate the trial court's order that the subpoena was adequate; and third, order the trial court to postpone the subpoena's date for petitioner Lampman's appearance to allow time for a hearing pursuant to the requested writs.

II. *No. 23177*

Petitioner Gershon L. Lewis is vice-president and controller of Westdale Savings and Loan Association. On Aug. 7, 1968, he received a subpoena duces tecum from the grand jury acting in the related cases. This subpoena ordered him to appear on Aug. 20, 1968, and to present books and records of Westdale Savings and Loan Association for 1962-1966.

Petitioner had been served with a summons requesting similar books and records on Nov. 2, 1967. Contending that the summons raised constitutional questions then being litigated in the United States District Court for the Central District of California, petitioner requested that no action be taken on the summons until the pending proceedings were concluded. No subsequent enforcement action has been taken by the Service regarding the summons.

On Aug. 16, 1968, petitioner's motion to quash the subpoena was denied by the same District Court which had overruled similar motions by the petitioners, *supra*. That court also denied petitioner's motion for a one week stay pending appeal to this court. Petitioner now prays that this court grant a writ of mandamus or a writ of prohibition or, in the alternative, a stay pending appeal, which would excuse petitioner's

appearance before the grand jury until ordered by this court.

III. *No. 23178*

Petitioner Bolker, president of Wolpole Estates, Inc., was served with a subpoena duces tecum from the Grand Jury for the United States District Court for the Central District of California on Aug. 9, 1968. It directed him to appear on Aug. 20, 1968, with business records and books of Wolpole Estates, Inc. for the fiscal years 1962-1966.

These documents had previously been sought by the Internal Revenue Service; on Feb. 7, 1968, enforcement action was begun on a summons that had been made for them. Petitioner filed a counterclaim and application for a three-judge district court. After argument, the parties stipulated that further enforcement action on the summons would be held in abeyance and the matter continued until Oct. 1, 1968, or until a similar suit involving an application for a three-judge court, then on appeal in this court, was resolved.

On Aug. 15, 1968, petitioner filed a motion with the same court that had heard petitioner Lampman's application for time to file a motion to quash, *supra*. This motion sought a continuance of petitioner's appearance until Sept. 3, 1968, or until a time determined by the District Court judge sitting on the Government's enforcement proceedings for its summons. Petitioner stated that it was his intention to present that judge with a motion to quash the subpoena at this later date.

On Aug. 16, 1968, petitioner's motions to continue and to quash were denied, as was petitioner's sub-

sequent motion for a week's stay pending appeal to our court. Petitioner now seeks a writ of mandamus or a writ of prohibition or in the alternative, a stay pending appeal which would excuse the petitioner from appearing before the grand jury until a time determined by this court.

* * *

The petition in No. 23173 was presented to Judge Barnes, and at about the same time, the petitions in Numbers 23177 and 23178 were presented to Judge Ely. Judges Barnes and Ely conferred and determined that the two of them would act in cooperation in the determination of the three petitions, at least preliminarily. They invited informal oral argument on the part of the petitioners, of the respondent, and of the United States, and such oral presentation was made. The attorneys for the Government agreed that the times for the appearance by petitioners in response to the subpoenaes would be continued, pending the disposition of the petitions by the judges of this court.

Upon consideration, Judges Barnes and Ely have determined that each of the three petitions presents issues which should, according to the internal policy and practices of the court, properly be decided by a panel of three judges of the Court of Appeals, and, in line with such policy, Judges Barnes and Ely will summon a third judge to assist in the disposition of the three petitions. When the third judge has been designated, he, along with Judges Barnes and Ely, will decide if additional oral argument will be heard. Meanwhile, each of the parties will, within seven days from the date of this order, advise the court as to whether or not there is a desire to present oral argument before the three judges.

In aid of the jurisdiction of the Court of Appeals, it is directed that compliance with the subpoenaes questioned shall be stayed, until further order of this court.

Pending the final disposition of the three petitions, the District Court is authorized to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the Court of Appeals a more complete record upon which to rest its disposition of the pending motions. If the petitioners renew their motions to the District Court, and if the District Court decides to conduct any hearing, then the petitioners will immediately notify the Clerk of the Court of Appeals to the end that the judges concerned will be apprised of the possibility of a supplementation of the record.

/s/ STANLEY N. BARNES
/s/ WALTER ELY
United States Circuit Judges

## APPENDIX D.

### Order.

United States District Court, Central District of California.

In the Matter of the Subpoena Duces Tecum directed to Owen B. Lampman, etc. Misc. No. 2001.

In the Matter of Grand Jury Subpoena Duces Tecum served upon Joseph R. Bolker, etc. Misc. No. 2005

In the Matter of Grand Jury Subpoena Duces Tecum served upon Gershon L. Lewis. Misc. No. 2006.

Filed, Feb. 26, 1969.

The above entitled matters are presently on appeal. By order filed September 10, 1968, the circuit court authorized this court "to conduct any further hearings which, upon any motion of the petitioners, it may choose to conduct and which may tend to afford the court of appeals a more complete record upon which to rest its disposition of the pending motions."

Thereafter, the petitioner in each case made a motion to make a more complete record. On December 9, 1968, this court determined that the petitioners should be permitted to augment the record within reasonable limits and provided that "the moving parties may have until December 20, 1968, to file motions to quash upon such grounds as they may wish to set forth and may, within such time, file such affidavits in support thereof as they may desire. The respondents shall have until the 10th of January, 1969, within which to file such opposition as they may wish. The movants, then, shall have until the 20th of January, 1969, to reply and the matter will be heard Monday, January 27,

1969. It is further ordered that there shall be no depositions or other discovery unless specifically permitted by the court."

Thereafter, in each of these matters renewal of the motion to quash the grand jury subpoena duces tecum was filed with supporting affidavit, and in each case the Government has filed its opposition thereto.

These papers present little, if anything, new but are mere repetitions and restatements of earlier arguments, all of which are presently before the circuit court of appeals. It appears to this court that petitioners' contentions are all matters of law and that each of these proceedings is in a posture suitable for consideration by the circuit court of appeals.

Petitioners have contended that they should have further discovery opportunities, but there has been no showing of any necessity therefor other than a desire on the part of the petitioners to interrogate agents and employees of the Internal Revenue Service in the hope of finding some evidence to support their contentions. About the only factual issue, if it be an issue, is the suggestion that the court should take judicial knowledge that in similar cases now pending upon appeal it has been "alleged" that agents of the Internal Revenue Service have been guilty of fraud. This court is familiar with one such case having heard it originally. In that proceeding generous discovery privileges were given petitioners in order that they might be permitted to find evidence in support of their allegations. What followed may best be characterized as an extensive "fishing expedition" which produced nothing of importance.

The attorneys for petitioners here have been unable to give this court any indication or assurance that further discovery in these proceedings will be any more fruitful or that they intend to explore any new sources of information. It appears, therefore, that the discovery requested would only harass the Internal Revenue Service and delay the proceedings.

The renewal motion to quash the subpoena duces tecum in each of the above entitled proceeding is, therefore, denied.

Petitioners' request for further discovery is likewise denied, and

IT IS FURTHER ORDERED that the record as it relates to the proceedings of this court, conducted under the authority and the order of the circuit of appeals, filed September 10, 1968, be forwarded to the clerk of the circuit court of appeals for its use in whatever manner it deems proper.

Dated: Feb. 26, 1969.

/s/ JESSE W. CURTIS
Jesse W. Curtis
United States District Judge

## APPENDIX E.

### Order.

United States Court of Appeals for the Ninth Circuit.

Maricopa Tallow Works, Inc., Movant, and W. J. Gieszl, Thomas E. Lewis, Ned Lewis, T. L. Bergen, Robert L. Poer, and Anaheim Citrus Producers Co., Inc., Appellants, vs. United States of America, Appellee. 21,802.

[August 16, 1967]

*On Motion to Dismiss*

Before POPE, KOELSCH and BROWNING, Circuit Judges.

The United States has moved to dismiss the appeal herein on the ground that the order appealed from is not a final judgment under Title 28 USC §1291. The appellants resist that motion for the reasons adopted and stated by this court in Continental Oil Co. v. United States, 330 F. 2d 347.

The appeal here is from an order denying a motion to quash a grand jury subpoena *duces tecum*. The order denying the motion to quash made it plain that the materials to be produced under the subpoena were limited to corporate records of Maricopa Tallow Works, Inc. During the pendency of the motion W. J. Gieszl and five others were permitted to intervene in support of the motion to quash which was made on behalf of Maricopa Tallow Works, Inc. It appears that the last named corporation was a closely held corporation of which the interveners were the principal officers and stockholders. The order requiring production of the corporate records was based upon the authority of the

decision of this court in Wild v. Brewer, 329 F.2d 924, which held that the privilege of the Fifth Amendment relating to self-incrimination was not available to a corporation in respect to its records and papers.

The contention of the appellant in its attempted appeal is that the rule of Wild v. Brewer, just mentioned, should not be applied here since because this is a very closely held corporation, the production of its papers would tend to incriminate the intervening individuals who are in effect its sole stockholders. Wild v. Brewer supra, rejected such an argument, but the would-be appellants' contention here is that in view of the Supreme Court's present tendency to extend and enlarge the privilege against self-incrimination, it is now time to reverse Wild v. Brewer and similar cases.

In Wild v. Brewer this court came near reaching the result argued for by the appellants here. That was a case of a sole stockholder. A majority of the panel in this court first held that the record sought relating to tax liability of the corporation need not be produced since the production of such evidence might tend to incriminate the sole stockholder. The opinion was by Judge Madden, concurred in by Judge Merrill with dissent by Judge Koelsch. Subsequently, Judge Merrill changed his views and the final opinion was written by Judge Merrill with Judge Koelsch concurring and Judge Madden dissenting.

On this motion the would-be appellants call our attention to the present tendency to enlarge and liberalize the privilege against self-incrimination. Examples of this are said to be Spevack v. Klein, 385 U.S. 511 and Garrity v. New Jersey, 385 U.S. 493. It is suggested

that if we hear argument on this point we might decide that as a practical matter allowing this subpoena to stand will bring about self-incrimination of the interveners.

It appears to us that such an argument is not wholly without merit and that we are presented here with a substantial question which the appellants are entitled to have decided. Of course the order appealed from is not a final judgment, but there is substantial authority in support of the statement of Moore's Federal Practice, Vol. 6, p. 93, "If the order is non-appealable and the party nevertheless takes an improvident appeal, there is authority to the effect that the improvident appeal may be treated as a petition for an appropriate writ." In substance this is what the court did in Continental Oil Co. v. United States, supra, and see Shapiro v. Bonanza Hotel Co., 9 Cir., 185 F. 2d 777, 779, and Steccone v. Morse-Starrett Products Co., 9 cir., 191 F. 2d 197, 200. We think it to be in the interest of justice in this case to treat the attempted appeal as a petition for a writ of mandamus. Accordingly the motion to dismiss the appeal is denied and the United States is directed to respond in the manner in which it would be required to do were the appeal papers denominated a petition for mandamus.